Public Prosecutor v Abdul Majid

HIGH COURT (SHAH ALAM) — CRIMINAL REVISION 43-13-1993
JAMES FOONG J
15 AUGUST 1994

***Evidence** — Witness — Spouse — Whether wife of accused could be compelled to give evidence for the prosecution — Whether English law on compellability of witnesses applies — Evidence Act 1950 ss 120 & 122*

The accused was charged for murder under s 302 of the Penal Code (FMS Cap 45). At the preliminary enquiry, the prosecution attempted to call the accused's wife as a witness for the prosecution. The accused's counsel objected to this on the ground that although she was a competent witness, she could not be compelled to tender evidence against her own husband. The magistrate ruled that the accused's wife could not be compelled to give any evidence against her husband. The prosecution then referred the matter to the High Court for determination while the preliminary enquiry was put on hold.

Held, finding that the accused's wife could be compelled to give evidence and ordering the magistrate to record her evidence:

(1) The laws on the issue of spouse witness are governed by the Evidence Act 1950 ('the Act') and the magistrate had erred in adopting English law. By s 120 of the Act, a husband or wife is a competent witness in criminal proceedings against any person although the question of compellability is not specifically stated.

(2) By virtue of s 122 of the Act however, no person who is or has been married shall be compelled to disclose any communication made to him during marriage unless the person who made the communication consents. The use of the word 'compelled' in s 122 shows that it was the legislature's intention that a competent witness should generally also be a compellable one.

(3) Therefore, the accused's wife could be compelled to give evidence with the exception of communications by the accused to her unless the consent of the accused had been obtained as required under s 122 of the Act.

[Bahasa Malaysia summary

Tertuduh telah dituduh atas kesalahan membunuh di bawah s 302 Kanun Keseksaan (FMS Bab 45). Pada siasatan permulaan, pihak pendakwa telah mencuba memanggil isteri tertuduh sebagai seorang saksi pendakwa. Peguambela tertuduh telah membuat bantahan atas alasan bahawa walaupun isteri tertuduh adalah seorang saksi kompeten, beliau tidak boleh dipaksa untuk memberi keterangan yang menentang suaminya sendiri. Majistret telah memutuskan

bahawa isteri tertuduh tidak boleh dipaksa untuk memberi sebarang keterangan yang menentang suaminya. Pihak pendakwa kemudiannya telah merujuk perkara itu kepada Mahkamah Tinggi untuk keputusannya sementara siasatan permulaan itu ditangguhkan.

Diputuskan, mendapati bahawa isteri tertuduh boleh dipaksa untuk memberi keterangan dan memerintahkan supaya majistret mencatatkan keterangannya:

(1) Undang-undang berkenaan dengan isu saksi pasangan ditentukan oleh Akta Keterangan 1950 ('Akta itu') dan majistret telah membuat kesilapan apabila beliau mengikut undang-undang Inggeris. Mengikut s 120 Akta itu, seseorang suami atau isteri merupakan seorang saksi kompeten di dalam prosiding jenayah terhadap sesiapa juga, walaupun soalan mengenai kebolehpaksaan tidak disebut secara nyata.

(2) Bagaimanapun, mengikut s 122 Akta itu, seorang yang beristeri atau bersuami atau telah beristeri atau bersuami tidak boleh dipaksa mendedahkan apa-apa komunikasi yang telah dibuat kepadanya dalam masa dia beristeri atau bersuami melainkan jika orang telah membuat komunikasi itu mengizinkan. Kegunaan perkataan 'dipaksa' di dalam s 122 menunjukkan bahawa adalah menjadi niat badan perundangan supaya seorang saksi kompeten seharusnya juga merupakan seorang saksi paksa.

(3) Oleh yang demikian, isteri tertuduh boleh dipaksa untuk memberi keterangan kecuali komunikasi yang dibuat oleh tertuduh kepada beliau melainkan jika keizinan tertuduh diperolehi seperti yang diperlukan di bawah s 122 Akta itu.]

Notes

For a case on compelling a spouse to be a witness, see 7 *Mallal's Digest* (4th Ed) para 1421.

Cases referred to

Ghouse bin Haji Kader Mustan v R [1946] MLJ 36 (folld)
Gimbu bin Sangkaling v R [1958] SCR 114 (folld)
Hoskyn v Metropolitan Police Commissioner [1979] AC 474; [1978] 2 All ER 136; [1978] 2 WLR 695 (not folld)
R v Lapworth [1931] 1 KB 117 (refd)
R v Leach [1912] AC 305 (not folld)

Legislation referred to

Evidence Act 1950 ss 120, 122
Penal Code (FMS Cap 45) s 302
Criminal Evidence Act 1898 [UK]

Wan Ahmad Kamal (Deputy Public Prosecutor) for the public prosecutor.
S Chandragesan (*SG Gesan & Associates*) for the respondent.

James Foong J: This is a criminal revision brought to the attention of this court by the learned deputy prosecutor in respect of a decision made by the learned magistrate in Rawang.

The accused in this case is charged for murder under s 302 of the Penal Code (FMS Cap 45). At the preliminary enquiry held before the learned magistrate in Rawang, the public prosecutor attempted to call the accused's wife, Syarifah Marina bte Syed Hamzah (Syarifah in short) as a witness for the prosecution. The accused's counsel objected to this on the ground that, though she is a competent witness, she could not be compelled to tender evidence against her own husband. At that stage, Syarifah herself declared that she was unwilling to render evidence against the accused in court. Upon this, the learned magistrate then ruled that Syarifah, though a competent witness could not be compelled to give any evidence in this case against the accused, as he is her husband. The magistrate based his decision on the English authority *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474; [1978] 2 All ER 136; [1978] 2 WLR 695. Upon this decision, the learned deputy prosecutor immediately referred to this matter to this court for determination while the preliminary enquiry was put on hold.

It has been the general common law rule in England that a wife or a husband is incompetent to give evidence against the other except in a few exceptional circumstances. The principle behind this rule is that the family unity must be preserved and, to allow a spouse to testify against the other 'would give rise to discord and perjury and would be, to ordinary people repugnant' (per Lord Wilberforce in *Hoskyn*'s case).

Through various statutes passed in the 1800s particularly, the Criminal Evidence Act 1898, the position of a spouse witness was somewhat changed in England. The spouse witness became a competent witness. However, though competent, the issue of whether he or she is a compellable witness was unsettled. Since the case of *R v Lapworth* [1931] 1 KB 117, decided by the Court of Criminal Appeal in England, the law on this matter seemed to rest on the principle that anyone who was a competent witness was also a compellable witness.

This state of law went on for almost 40 years until *Hoskyn*'s case where the House of Lords by a majority of 4:1 (with Lord Edmund-Davis dissenting), declared that the decision in *R v Lapworth* was wrong. In its place, the House of Lords restated one of their earlier decision, *R v Leach* [1912] AC 305, to be the correct law. By this, a spouse witness though a competent witness to testify against each other, is not a compellable witness.

The facts in *Hoskyn*'s case are briefly as follows. Hoskyn was charged for wounding his girlfriend. Two days before his trial, he married this girl. At the trial, his girlfriend who by then had become Mrs Hoskyn was unwilling to give evidence. The trial judge following the principle as set out in *R v Lapworth* compelled her to testify. She did not give the evidence as expected of her by the prosecution and, was thus treated as a hostile witness. Hoskyn was duly convicted and one of his grounds of appeal was

that Mrs Hoskyn being his wife could not be compelled to testify against him, her husband. The House of Lords ruled in his favour. A

This landmark case obviously must have disturbed and influenced the learned magistrate in our case, as he was of the opinion that *Hoskyn*'s case, being a House of Lords decision overruling all previous heavyweight authorities, must be applicable here. B

The laws on this issue of spouse witness though somewhat similar in outline to those in England, are governed by our own Evidence Act 1950. By s 120 of the Evidence Act 1950, a spouse witness becomes a competent witness in criminal proceedings against any person. However, the question of whether he or she is a compellable witness is not specifically stated anywhere in the Evidence Act 1950 except, a little glimpse of it is made under s 122. C

Section 122 reads as follows:

> No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication unless the person who made it or his representative in interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other. D

This section, as one will notice does not provide any clear cut answer to the issue. Through my own research, I discovered an early Straits Settlements authority, *Ghouse bin Haji Kader Mustan v R* [1946] MLJ 36, decided by the then Chief Justice of the Straits Settlements, Sir McElwaine which has some direct reference to this point. In this case, the appellant was charged for kidnapping a girl by the name of Isah then under the age of 16 from her lawful guardian. A day after the kidnap, the appellant married Isah. Isah must have testified against the appellant thus leading to his conviction. One of the grounds of appeal by the appellant was that Isah, being his wife could not be compelled to give evidence against him. After considering various authorities, most of it from Africa, the respected Chief Justice ruled as follows [at p 37]: E F G

> If a witness in this colony [Colony of Singapore] is 'competent' and has been summoned he is bound to give evidence, and to answer all relevant questions. There is no class of witness who can be called a 'compellable witness'. The words 'compellable' when used in the Evidence Ordinance relate not so much to a witness as to a type of evidence; and in my opinion a witness may be compelled to give any relevant evidence unless a section enacts that he shall not be compelled to give it. H

This decision seems to have found favour in the Borneo States. In the case of *Gimbu bin Sangkaling v R* [1958] SCR 114, the Court of Appeal in the combined judiciary of North Borneo, Sarawak and Brunei, decided to adopt the principle that a competent witness is also a compellable witness. In this case, Gimbu was charged for murdering his father-in-law. Gimbu's wife, the deceased's daughter, was asked to testify against Gimbu to the effect that she saw Gimbu and his father go out on a frog hunting expedition I

A together and, how Gimbu returned alone. Though she was unwilling to testify, she was compelled to do so by the trial judge. In adopting the principle of compellability attached to competency, Smith Ag CJ in this Court of Appeal has this to say:

> Unless the wife can point to any exception in the law relieving her from the
> B obligation to give evidence, then she is bound to give evidence. The whole process of law would be stultified if a witness could without legal excuse decline to give evidence. This court considers that references to the English common law and to decisions under the Criminal Evidence Act 1898 [of England] are irrelevant.

C After careful consideration of all relevant authorities, I am of the view that our laws are different from those in England. Section 120 of the Evidence Act 1950, without dispute from any quarters, makes a husband or a wife a competent witness against any person in criminal proceedings. Section 122 of the Evidence Act 1950 however, has reference to the issue of compellability by stating that, 'No person who is or has been married shall
D be *compelled* to disclose any communication made to him during marriage ...'. (Emphasis added.)

By inserting the word 'compelled' into this section of the Evidence Act 1950, the legislature must have pre-accepted the general principle that, a competent witness is also a compellable witness, otherwise there is
E no necessity for the inclusion of this word. If the legislators' intention was otherwise, s 122 would read just as well and without any ambiguity if the word 'compelled' were not inserted therein. The reading would be better and its meaning direct as can be seen as follows: 'No person who is or has been married shall disclose any communication, made to him during marriage ...'.

F Therefore, there must have been a special purpose for the inclusion of this word 'compelled' into s 122 and, what more could it be than a direct reference to the compellability of all spouse witnesses to give evidence with the exception of communications from one spouse to another except with consent. This must be the intention of the legislature, otherwise the
G learned lawmakers would not have stated what is more than necessary.

There are great reasonings for the adoption of this principle of compellability and, to my mind besides those stated by the learned judges in *Ghouse* and *Gimbu*, they are best expressed by Lane LJ (as he then was) in *Hoskyn*'s case at the Court of Appeal stage as follows:

H
> It must be borne in mind that the court of trial in circumstances such as this where violence is concerned ... is not dealing merely with a domestic dispute between husband and wife, but it is investigating a crime. It is in the interests of the state and members of the public that where that is the case, evidence of that crime should be freely available to the court which is trying the crime.

I It must be noted that though Lord Lane's reasoning above was commented upon and rejected by Lord Salmon in *Hoskyn*'s case in the House of Lords ([1979] AC 474 at p 498; [1978] 2 All ER 136 at pp 151–152; [1978] 2 WLR 695 at pp 711–712), I am unable to find much justification in the

reasons for its rejection. I find Lord Lane's reasoning sound and most applicable to our Malaysian society and attitude which is very much different from that of the United Kingdom.

Having established that, I shall now turn to the decision of the learned magistrate on this issue. I find that the said magistrate has erred in adopting the ruling in *Hoskyn*'s case as law for this country. I therefore order the learned magistrate to proceed with the enquiry and to record the evidence of Syarifah, and if she is unwilling to testify, to compel her to do so. However, in the course of her testimony, if there had been any communication by the accused to her, such communication cannot be compelled to be disclosed by her unless the consent of the accused is obtained as provided for under s 122 of the Evidence Act 1950.

Order accordingly.

Reported by Anne Khoo